IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.1043 of 1993

K.Sivakumar .. Appellant

-Vs-

1. V.Selvaraj
2. Senthamizh Selvi .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree dated 24.4.1992 made in A.S.No.3/92 on the file of the Sub Court, Thanjavur, confirming the judgment and decree dated 30.7.1991 made in O.S.No.22/89 on the file of the District Munsif Court, Thiruvayaru.

!For Appellant : Mr.Mohana Sundararajan

^For Respondents : Mr.S.Gopal Ratnam for R1
R2 - No appearance

:JUDGMENT

The second defendant in a suit for redemption of a mortgage and for recovery of possession is the appellant herein.
2. The first respondent as plaintiff filed the suit for the said reliefs, alleging that the suit property originally belonged to one Abdul Masjeed Rawthar; that he executed an othi in respect of the suit property by receiving Rs.4,000/- on 26.4.1971, in favour of the first defendant; that the time for redemption was shown therein as six years; that as per the terms of the othi, the first defendant was to enjoy the suit property and pay the kist during the othi period; that the said Abdul Masjeed Rawthar died leaving behind his wife Taj Beevi and two sons; that they sold the suit property for a consideration of Rs.25,000/- to the plaintiff by a registered sale deed dated 21.4.1987; that they received only Rs.21,000/- by way of cash and directed the plaintiff to discharge the othi by paying Rs.4,000/- and to take possession of the property from the first defendant, and thus, the plaintiff was entitled to get redemption of the suit property by paying Rs.4,000/- to the first defendant; that when the plaintiff offered the said sum of Rs.4,000/- and sought for redemption, the first defendant was evading, and she did not do so; that now the plaintiff came to know that the first defendant with an ulterior motive has put the second defendant in possession of the property in order to create loss and hardship to the plaintiff, and under such circumstances, the

suit has been brought forth against both the defendants for the necessary reliefs.

3. The first defendant filed a written statement stating that at the time the mortgage was created, the property was not fit for cultivation; that the first defendant spent a sum of Rs.2,500/- with the consent of Abdul Masjeed Rawthar to reclaim the land and made it fit for cultivation; that Rawthar promised to pay for the improvements made in the land; that the first defendant did not know anything about the alleged purchase of the plaintiff; that the plaintiff never offered to redeem the othi; that he never tendered any amount; that since the first defendant was helpless, the suit property was leased out to one Sivakumar with the consent of her mortgagor; that the plaintiff can redeem the suit property subject to the tenancy of Sivakumar, and hence, the suit was to be dismissed.

4. In his written statement, the second defendant stated that the first defendant leased out the suit property in his favour under a lease agreement in the year 1984 with the consent of the mortgagor; that the lease amount was Rs.300/- per year; that he used to send the sugarcane to the Sugar Mills; that he raised loan for the cultivation of the suit property from the Indian Overseas Bank; that his name has been recorded in the record of tenancy rights as a cultivating tenant, and thus, he is in possession and enjoyment of the suit property; that he was entitled to protection under the Tamil Nadu Cultivating Tenants Protection Act; that he was ready and willing to attorn to the plaintiff, if the mortgage is redeemed, and hence, the suit was to be dismissed.

5. On the above pleadings, the trial Court framed the necessary issues, tried the suit and granted a preliminary decree in respect of the reliefs sought for. Aggrieved, the second defendant took it on appeal, which was dismissed by the first appellate Court. Hence, this second appeal filed by the second defendant in the said suit.

6. At the time of admission, the following substantial questions of law were formulated by this Court:

(1) Whether the findings of the Courts below that the appellant has not established that he is a cultivating tenant are sustainable in law, in the light of Exs.B-1 to B-3?

(2) In the light of the record under the RTR Act in which the appellant has been recorded as a cultivating tenant, whether it is open to the civil Court to go into the said question and declare that the appellant is not a cultivating tenant which would have the effect of undoing the entry made under the RTR Act?

7. This Court heard the learned Counsel for the appellant and also the learned Counsel for the first respondent/plaintiff on those contentions. There was no representation for the second respondent.

8. As seen above, it was a suit filed by the first respondent/ plaintiff seeking redemption of a mortgage and for recovery of possession from the hands of the defendants. The trial Court has recorded a finding that there was an othi by the original owner; that the property was left in the possession of the first defendant on the basis of the othi; that pending the othi, the property was sold by the heirs of the original owner to the plaintiff for a sum of Rs.25,000/- under a sale deed dated 21.4.1987, wherein there was a direction given to the vendee namely the plaintiff to pay back the othi amount of Rs.4,000/- and to get possession, and hence, the plaintiff was

entitled to get possession pursuant to the sale. This finding was not challenged by the first defendant even before the first appellate Court, and thus, the finding in her regard has become final. Even, the first appeal was preferred only by the second defendant, who on dismissal of the appeal, has brought forth this second appeal also. Hence, this second appeal is limited only to the question whether the appellant/second defendant can retain possession of the property on the ground that he was a cultivating tenant in respect of the property under the first defendant. A careful scrutiny of the available materials would lead to the irresistible conclusion that it has to be found in negative.

9. As could be seen from the written statement, filed by the second defendant, the first defendant found it very difficult to carry on the personal cultivation, and hence, she leased out the suit property in favour of the second defendant under a lease agreement in the year 1984 with the consent of the mortgagor, and the lease amount was Rs.3 00/- per year. According to the second defendant, he sold the sugarcane to the Sugar Mills and raised loan for the purpose of cultivation from the Indian Overseas Bank, and his name has also been recorded in the record of tenancy rights as a cultivating tenant, and thus, he has been in possession of the property as a cultivating tenant, and his right has got to be protected. He has relied on two documents namely Ex.B2, an order passed by the Tahsildear, Tiruvayaru, on the petition by the second defendant for the purpose of recording him as a cultivating tenant and Ex.B3, the entry in the record of tenancy rights, to prove his case. The first appellate Court has pointed out number of circumstances, which stood against the plea of the second defendant that he was in possession of the suit property as a cultivating tenant. At the outset, it has to be stated that the first defendant has not examined herself to speak about the fact that the property was in the possession of the second defendant, pursuant to any lease agreement between the parties. In order to prove that the second defendant has been in possession as a cultivating tenant, no material was placed before the Courts below.

10. Had it been true that the second defendant was in possession of the property from 1984, as a lessee, he would have either examined the first defendant or summoned the lease agreement entered into between the parties or at least, produced the receipts for payment of the lease amount all along the period. It is pertinent to point out that those documents, which were added as additional evidence, would clearly reveal that they have come into existence subsequent to the sale made by the vendors in favour of the plaintiff. The lower appellate Court was perfectly correct in commenting that those documents have been created for the purpose of the case. That apart, the lower appellate Court has also pointed out that the second defendant during the relevant period, was doing his Master Degree Course in a College at Madras, and subsequently, he continued his legal education at Salem, and hence, it would be highly difficult to accept his case that he was personally cultivating the lands as a cultivating tenant on behalf of the first defendant during the relevant period. Thus, the evidence what were available, would clearly reveal that the whole theory put forth by the second defendant, that he was a cultivating tenant in respect of the property was a ruse invented for the purpose of the case. Therefore, both the Courts below were perfectly correct in rejecting such a plea. This Court is unable to notice any merit in this appeal, and the same is liable to be dismissed.

11. In the result, this second appeal is dismissed, confirming the judgments and decrees of the lower Courts and leaving the parties to bear their costs.

Index: yes
Internet: yes

To:

1. The Subordinate Judge
Thanjavur
2. The District Munsif
Thiruvayaru
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/

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